In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1077

HENRY FRANCIS WALTERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner attacks the district court's rulings (a) consolidating for trial separate indictments that charged related offenses by him and another defendant, and (b) thereafter refusing to sever their trials.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on seven counts of possessing counterfeit federal reserve notes and on seven counts of selling the same notes, in violation of 18 U.S.C. 472 and 473.[1] He was

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[1] Co-defendant Hobdy was convicted on two counts of possessing counterfeit federal reserve notes, on two counts of possessing materials to be used in counterfeiting United States obligations, and on two counts of manufacturing such materials, in violation of 18 U.S.C. 472 and 474.

sentenced to concurrent terms of imprisonment for five years. The court of appeals affirmed *per curiam* (Pet. App. A1). A petition for rehearing was denied on January 3, 1973 (Pet. App. A2). The petition for a writ of certiorari was filed on February 3, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the questions sought to be raised do not merit further review.

On the same day that the grand jury returned the fourteen-count indictment against petitioner, it returned a six-count indictment against Philip Hobdy. The court granted the government's pretrial motion to consolidate the two cases and denied petitioner's pretrial motion for a severance. Petitioner did not renew his motion for a severance during the trial.

The evidence showed that prior to June 24, 1970, one Ralph Smith was arrested by Michigan state police for possession of counterfeit United States notes. Smith thereafter agreed to cooperate with the Secret Service and implicated petitioner and Hobdy in a counterfeiting operation. On June 24, Smith introduced Agent Germane, under an assumed name, to petitioner as a prospective buyer of counterfeit currency. After discussing Germane's interest in disposing of $100,000 of counterfeit notes, petitioner took him to his print shop in Alma, Michigan, and introduced him to Hobdy, an employee of the print shop. He also told Germane about some of his methods of producing counterfeit money. (Tr. 27-38, 97, 99, 103-116.)[2]

The next morning, petitioner transferred some of the counterfeit notes to Germane and instructed him in

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[2] "Tr." refers to the trial transcript, a copy of which we are lodging with this Court. "Insts." refers to the instructions to the jury, which are separately paginated at the end of the transcript.

techniques of "aging" the bills (Tr. 36-38, 110-117). Tha evening, Germane furnished petitioner and Hobdy with some genuine notes to be used as patterns in the counterfeiting process. Hobdy then prepared counterfeit notes while petitioner kept a lookout (Tr. 55-62, 123-131). On the following evening, while Hobdy continued the counterfeiting process, Germane gave a prearranged signal to other agents, who arrested Hobdy and searched the print shop pursuant to a warrant (Tr. 67-69). Some of the notes seized from Hobdy were the same type and had the identical serial numbers as some of those given to Germane by petitioner (Tr. 202-203).

Under Rule 13, Federal Rules of Criminal Procedure, separate indictments may be consolidated for trial if the offenses and the defendants "could have been joined in a single indictment or information." Rule 8(b) provides that two defendants may be charged in a single indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Since petitioner and Hobdy were shown to have participated in the same counterfeiting operation, out of which grew the related charges against each, joinder would clearly have been proper under Rule 8. It follows that consolidation of their separate indictments for trial was also proper.

The district court did not abuse its discretion under Rule 14 by denying petitioner's motion for a severance. That rule applies to relief only from *prejudicial* joinder, and there was no prejudice here to any of petitioner's substantial rights. Although he complains of evidence relating to Hobdy's manufacture of counterfeit notes, much of that evidence would have been admissible against petitioner even at a separate trial. Proof relating to the counterfeit operation generally tended to show petitioner's

intent to defraud (18 U.S.C. 472) and his intent that the notes given to the agent would be passed as genuine (18 U.S.C. 473). The court carefully instructed the jury, both during the trial and in its final charge, that any evidence relating solely to one of the defendants must not be considered as against the other (Tr. 50-51; Insts. 21).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.